


EXHIBIT 5



Subject: RE: Oracle v SAP -- Follow up wrt Revised Draft Agreement 
From: Rachel L. Rawson 03/23/2011 08:21 PM
 Extension: 67276 (inside Jones Day) or 216-586-7276
To: Alinder, Zachary J.
Cc: "Nelson, Daniel A.", "Gregory Castanias", "Howard, Geoff", "Jane L Froyd", "Jacqueline K. S. Lee", "Kenneth J. Krupsky", "Schnall, Matthew D.", "Nicole Massey", "Brundage, Robert A."

2 attachments



NYI_4357364_1_Change-Pro Redline - NYI-4349222-9 and NYI-4349222-10.DOC



NYI_4349222_10_SAP Escrow Agreement.DOC

Zac,

We write to follow up on the parties' meet and confer this afternoon regarding use of an escrow agreement as security for the judgment pending appeal. In anticipation of tomorrow's deadline for Defendants to file a Rule 62 motion and to facilitate the parties' discussion of the remaining issues, we provide a summary of these issues and their status below.

First, you conveyed that JP Morgan has now approved Bingham McCutchen's request for a prospective conflict waiver relating to litigation arising out of the escrow agreement. Thus, as confirmed on our meet and confer call, this issue has now been resolved.

Second, the parties further discussed their respective revisions to Section 9(b), which sets forth tax reporting procedures and the limited circumstances under which SAP would indemnify Oracle for tax liabilities arising out of the escrow agreement. As we have discussed, SAP does not believe that any indemnification is necessary, particularly when Oracle has not identified any increased tax risk that either a plain vanilla escrow account or a qualified settlement fund escrow account might pose above and beyond any risk a supersedeas bond might impose. While SAP is willing to entertain a very limited indemnity relating only to SAP's own reporting obligations, it is important to SAP that such indemnity cannot be triggered by unilateral IRS actions. Therefore, during the call, we raised the concern that, despite the current provision pursuant to which SAP would attempt to make a grantor trust election should the IRS deem the escrow account a qualified settlement fund, the IRS may nonetheless take what we believe is the incorrect position that that such an election is invalid. Oracle confirmed that even if the IRS determines that such an election is invalid, SAP will not be found to have breached its agreement (and thus, its obligation to indemnify Oracle for tax liabilities will not be triggered by that event). In light of this discussion, as well as additional edits to Section 9(b) discussed on the call (including Oracle's proposal that SAP covenant that it will provide Oracle its proposed grantor trust election 40 days in advance of filing), the parties will confirm with their respective clients that the language of Section 9(b) is acceptable.

Finally, despite Oracle's previous representation that it may be willing to agree to indemnify JP Morgan for defined losses resulting solely as a result of Oracle's conduct (as provided in Section 8 of SAP's current draft agreement), you confirmed today that Oracle will not agree to such language. You noted that it is unlikely that Oracle's position on this issue will change, but agreed to let us know immediately if it does.

Ultimately, based on the parties' discussion today, we understand that only two issues remain open with respect to the escrow agreement - the tax indemnity language of Section 9(b) and the indemnity language of Section 8. I have attached a revised copy of the Escrow Agreement, together with a copy marked to

Attached is a further revised version of the draft Escrow Agreement following up on our meet and confer today. This version should reflect most of the proposed revisions and open items discussed on the call, except for those proposed by JPMC that you relayed. Further, as we discussed at the end of the call, the proposed agreement, and in particular the Section 9 tax reporting language, is subject to final approval by both of our clients.

Best regards,
Zac

From: Alinder, Zachary J.
Sent: Wednesday, March 23, 2011 1:58 PM
To: 'Rachel L. Rawson'
Cc: 'Gregory Castanias'; Howard, Geoff; 'Jane L Froyd'; 'Jacqueline K. S. Lee'; Nicole Massey; Brundage, Robert A.; Nelson, Daniel A.; Schnall, Matthew D.; Kenneth J. Krupsky
Subject: RE: Oracle v SAP -- Follow up wrt Revised Draft Agreement

Rachel,
In advance of the meet and confer, attached is what I understand to be the current draft of the Escrow Agreement: (1) accepting for the time being the proposed changes following our call yesterday; (2) with some additional minor line edits; (3) with edits to Section 8 showing that Oracle has not agreed to the Indemnity of JPMC; and, (4) inserting what I understand to be the current proposed tax language in Section 9(b)(ii).
Best regards,
Zac

From: Rachel L. Rawson [<mailto:rlawson@JonesDay.com>]
Sent: Wednesday, March 23, 2011 1:11 PM
To: Alinder, Zachary J.
Cc: Hinman, Frank; 'Gregory Castanias'; Howard, Geoff; 'Jane L Froyd'; 'Jacqueline K. S. Lee'; Nicole Massey; Brundage, Robert A.
Subject: RE: Oracle v SAP -- Follow up wrt Revised Draft Agreement

As a reminder, the call in information for 2 Pacific, 4 Chicago, 5 Eastern is

1-866-448-1308
Code 57 424 545.

Rachel

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 Cleveland, OH | 44114 | 216-586-7276 (ofc) | 216-406-3472 (cell)
rlrawson@jonesday.com

From: "Alinder, Zachary J." <zachary.alinder@bingham.com>
:
To: "Rachel L. Rawson" <rlrawson@JonesDay.com>

Cc "Hinman, Frank" <frank.hinman@bingham.com>, "Gregory Castanias" <gcastanias@JonesDay.com>, "Howard, Geoff" <geoff.howard@bingham.com>, "Jane L Froyd" <jfroyd@JonesDay.com>, "Jacqueline K. S. Lee" <jkslee@JonesDay.com>, "Nicole Massey" <nmassey@JonesDay.com>, "Brundage, Robert A." <robert.brundage@bingham.com>

Da 03/23/2011 02:04 PM
te:

Su RE: Oracle v SAP -- Follow up wrt Revised Draft Agreement
bje
ct:

Sure. We can postpone the meet and confer, but to be clear, my understanding was that it was set for 2pm Pacific time, not Eastern. Correct?

From: Rachel L. Rawson [<mailto:rlrawson@JonesDay.com>]
Sent: Wednesday, March 23, 2011 11:01 AM
To: Alinder, Zachary J.
Cc: Hinman, Frank; 'Gregory Castanias'; Howard, Geoff; 'Jane L Froyd'; 'Jacqueline K. S. Lee'; Nicole Massey; Brundage, Robert A.
Subject: RE: Oracle v SAP -- Follow up wrt Revised Draft Agreement

On a side note, can we postpone our meet and confer for about 15 minutes to 2:15 NY time?

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Fr "Alinder, Zachary J." <zachary.alinder@bingham.com>
om

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To: "Rachel L. Rawson" <rlrawson@JonesDay.com>

Cc: "Hinman, Frank" <frank.hinman@bingham.com>, "Gregory Castanias" <gcastanias@JonesDay.com>, "Howard, Geoff" <geoff.howard@bingham.com>, "Jane L Froyd" <jfroyd@JonesDay.com>, "Jacqueline K. S. Lee" <jkslee@JonesDay.com>, "Nicole Massey" <nmassey@JonesDay.com>, "Brundage, Robert A." <robert.brundage@bingham.com>

Da 03/23/2011 01:54 PM
te:

Su RE: Oracle v SAP -- Follow up wrt Revised Draft Agreement
bje
ct:

Thanks
Rachel

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 Rachel Rawson | Jones Day | 901 Lakeside Avenue
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 rlawson@jonesday.com

From Rachel L. Rawson/JonesDay

$$\vdots$$

To "Alinder, Zachary J." <zachary.alinder@bingham.com>

$$\vdots$$

Cc "Hinman, Frank" <frank.hinman@bingham.com>, "Gregory Castanias" <gcastanias@JonesDay.com>, "Howard, Geoff" <geoff.howard@bingham.com>, "Jane L Froyd" <jfroyd@JonesDay.com>, "Jacqueline K. S. Lee" <jkslee@JonesDay.com>, "Brundage, Robert A." <robert.brundage@bingham.com>, Nicole Massey/JonesDay@JonesDay

Da 03/22/2011 06:19 PM

te:

Su RE: Oracle v SAP -- Follow up wrt Revised Draft Agreement
bjc
ct:

Zac,

Thanks for passing on to us the names of the Bingham contacts at JPM. We have recently heard from JP

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[attachment "Revised 3-23-11_SAP Escrow Agreement.DOC" deleted by Rachel L. Rawson/JonesDay]

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